1903

The "Torrens Acts": Some Comparisons

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THE "TORRENS ACTS": SOME COMPARISONS

THE widespread discussion during the last ten years of the general scheme of registration of title to land, popularly known as the "Torrens System," has served to satisfy most disinterested lawyers and laymen of the general merits of the system. Consideration of the matter has been confined to no one section of the country, but has extended from Maine to California, and from Oregon to Texas. The result has been that laws embodying the general principles of the system have been enacted in six states, and proposed laws are before the legislatures of several others. The fact, however, that some of the earlier acts were declared invalid, and that some of the later acts have been referred to by the courts as "unskillfully drawn," or "crude," and the further facts that, although the California Act of 1897 has never, apparently, been in practical operation, while, on the other hand, the Illinois act of the same year has been, and the later acts of Massachusetts and Minnesota have been growing in favor, indicate that it may not be inappropriate, in view of proposed legislation, to compare the laws with each other on some points, even at this late day.[1]

As the mistake was made in some of the earlier legislation in this

[1] The acts to which references are made in this paper are: California, Stats. 1897, Ch. cx.; Illinois, L. 1897, p. 139, Hurd's R. S. 1899, Ch. 30, §§ 44-154, Starr & Curt. Supp. vol. 4, pp. 259-282; Massachusetts, St. 1898, C. 562, to be found as amended (in 1899 and 1900) in R. L. Mass. 1902, C. 128—in the revision, §1 of the original act is omitted, and the section numbers, therefore, are not the same as in the original act; Minnesota, Laws 1901 C. 237; Ohio, 92 O. L. 220 (1896); this act was declared invalid in 1897 and repealed in 1898, 93 O. L. 8; Oregon, Gen. L. 1901, p. 438; the proposed Michigan act, Senate Bill No. 52, January 1903, substantially follows the Illinois act, but with modifications hereinafter noted. A draft of the proposed Virginia act, most carefully prepared by Eugene C. Massie, of Richmond, reached the writer after this paper was in type: it therefore can be but briefly referred to.

The decisions on the Torrens acts are:—

People *v.* Chase (1897), 165 Ill. 527. 36 L. R. A. 105. declaring the Illinois act of 1895 invalid.

State *v.* Guilbert (1897), 56 Ohio St. 575, 47 N. E. 551, 38 L. R. A. 519, 60 Am. St. R. 756.

People *v.* Simon (1898), 176 Ill. 165, 52 N. E. 910, 44 L. R. A. 801, 68 Am. St. R. 175.

Tyler *v.* Judges of the Court of Registration (1900), 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433.

Tyler *v.* Judges, etc. (1900), 179 U. S. 405.

State *v.* Westfall (1902), 85 Minn. 437, 89 N. W. 175, 54 Cent. L. J. 282.

Questions of practice under the acts are passed upon in Gage *v.* Consumers' El. Light Co. (1901), 194 Ill. 30, and in Lancy *v.* Snow (1902), 180 Mass. 411.

It is interesting to note that the Torrens system has been adopted in the Philippine Islands, and is about to be, probably, in Hawaii.

country of copying too closely the Australian model, so the mistake may now be made of attempting to adopt in one state the entire statute of another without regard to usages and constitutional provisions in the adopting state. For, though as a general rule, a state adopting another state's statute adopts also the construction placed upon it in the latter state, this principle will not apply where the fundamental law of the adopting state, as construed by its courts, cannot permit it. So, for example, though the Illinois and Minnesota Torrens laws have been held constitutional in each of those states, they might, perhaps, in another state be held to be unconstitutional if adopted there, because they make no provision for a jury trial, or, at least, they might there be held, for this reason, inapplicable to certain cases to which, in their own states, they apply.[1]

Moreover, and aside from constitutional questions, it is practically unwise to adopt the statute of one state, without carefully considering whether some, at least, of the provisions of a similar statute in another state are not better.

Though it is not now proposed to discuss anew [2] the *general* merits, and possible demerits, of the system, but only to compare a few prominent features of the acts, it may be stated that the general objects aimed at by all the laws are: *First*, certainty and facility in the proof of title; and *second*, simplicity in dealings with land after the title is thus proved.

The general means by which these objects are sought to be attained are: (a) The registration of title, and the issuance to the

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[1] See Chandler *v.* Graham, 123 Mich. 327; Tabor *v.* Cook, 15 Mich. 322. This point is noted by way of illustration and suggestion merely. The Ohio act provided for a jury if demanded, § 34; the Massachusetts act provides for one in certain cases on appeal to the Superior Court, § 13.

[2] Most of the literature on the subject of registration of title is in the form of addresses, papers in legal periodicals, etc.

In Theo. Sheldon's "Land Registration in Illinois" (Callaghan & Co., 1901), a full list of treatises and papers relating to the subject will be found. Among the papers published since Mr. Sheldon's list was prepared are;—

Land Title Registration in the United States, by Leonard A. Jones, 36 Am. L. R. 321.

Virginia and the Torrens System, by Eugene C. Massie, 35 Am. L. R. 727, 14 Reports Va. State Bar Association.

The Torrens System of Land Registration, by Alex. H. Robbins, 54 Cent. L. J. 282.

Practical Operation of the Torrens System in Massachusetts, by Clarence C. Smith, Ib, 285.

A report of the case of People *v.* Westfall, with a note, *Ib.* pp. 290, 293.

Address by Edward T. Taylor, Reports Colorado State Bar Association for 1902.

owner of a document called a certificate of title, which declares that the person named in it owns a specified estate in a specified piece of land; and (b) the requirement that, subsequently, title to the land registered shall pass only by the entry of the transfer upon the official register, and not by virtue of a deed, which, under the system, operates only as a contract.

In order that general constitutional provisions may be complied with, the "initial registration" of title, upon which the certificate of title is issued, must be the result of judicial proceedings to establish title; there must be notice to all having interests adverse to those of the applicant for registration; and only judicial officers may exercise judicial functions, whether as to the initial registration or as to subsequent dealings with the registered title.

When constitutional requirements are met by a state statute, its particular form and character may be determined by the state itself, for—

"It has control over property within its limits; and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subjection to its rules concerning the holding, the transfer, liability to obligations, private or public, *and the mode of establishing titles thereto* . . . . The well-being of every community requires that the title of real estate therein shall be secure, and that there be convenient and certain methods of determining any unsettled questions respecting it. The duty of accomplishing this is local in its nature; it is not a matter of national concern or vested in the general government; it remains with the state, and as this duty is one of the state, the manner of discharging it must be determined by the state, and no proceeding which it provides can be declared invalid, unless in conflict with some special inhibitions of the constitution or against natural justice." [1]

The Torrens acts are wearisomely long, but there is a noticeable tendency to shorten them. The Ohio act (1896), contained 168 sections, while the latest, that of Minnesota (1901), contains but 98.[2] The Ohio act included some provisions not quite reconcilable with others; this was due to the fact that the act as prepared by the commission was changed by the legislature, in parts, without being changed in other parts, so that it should be a consistent whole.

The chief matters to which attention will be given in this paper are: the court to which application is to be made; the effect of the court's decree, more especially as to the time when it shall become

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[1] Arndt *v.* Griggs, 134 U. S. 316, 320, 321.

[2] The proposed Virginia Act has but 59 sections, and nearly every section is shorter than the corresponding section of other acts.

conclusive; the parties defendant, and the provisions for notice to them; the investigation of title, with especial reference to the qualifications and appointment of examiners; a brief reference to the indemnity fund and to the question of compulsory registration.

Many other important and interesting matters involved within the scope of the acts must be left unnoticed.

I. THE COURT IN WHICH PROCEEDINGS FOR REGISTRATION OF TITLE ARE HAD

The Massachusetts act provides for the establishment of a "court of land registration, which shall have exclusive original jurisdiction of all applications for the registration of title to land within the commonwealth, with power to hear and determine all questions arising upon such applications," subject to the right of appeal as provided in the act. The court shall have jurisdiction throughout the state, and its two judges are appointed by the governor with the advice and consent of the council. All other land registration statutes, so far enacted, provide that the application for registration shall be made to a court already existing in the county where the land lies whose title is sought to be registered. In California, this is the superior court of the county; in Illinois, the court having chancery jurisdiction in the county; in Minnesota, the district court; in Oregon, the circuit court. It may be that the constitutions of some states so fix the present judicial systems of those states as to make it impossible, without amending the constitutions, to create separate courts for the determination of questions relating to the registration of land titles.[1] Wherever, however, no such obstacle exists, there are good reasons for believing that the Massachusetts plan of having a separate court is preferable to the more usual method of administering the law through the existing courts of the several counties.

The court of general jurisdiction in the county is largely occupied with subjects not connected with real property law, and in the more populous counties certainly, such courts are already too busy to review carefully every abstract of title and each report made by the official examiner, as is done under the Massachusetts practice. Evidence may be necessary to establish the applicant's title, but what evidence is required can hardly be known without reading the examiner's report in detail, on which reading a registration judge, well versed in real property law, would be qualified to suggest the

[1] See Constitution of Michigan. Art. VI., §§ 1, 6, 8, 13. 17, 23.

points that might require further investigation and perhaps another report. In contested cases, especially, the delays incident to hearing these special cases by a court already well occupied with litigation of all kinds would prove a serious impediment to the practical operation of the system. The expense of organizing a separate court would be comparatively small, and by the establishment of such a court of wide territorial jurisdiction, the increase in the number of local judges would be avoided. It seems desirable that the "initial registration," upon which so much afterwards depends, should not be made upon the decree of a court already fully occupied with a great variety of other matters, and also that it should be made as soon after the original application is filed as may be consistent with the giving of notice to all concerned, and with the examination of the title to the land described in the application. Under the Massachusetts plan the recorder of the court of land registration is its clerk, and acts under its direction.[1] The registers of deeds throughout the state are assistant recorders, and in executing the provisions of the act are subject to the general direction of the recorder, and act "in accordance with the rules and instructions of the court."[2] If an assistant recorder is in doubt upon any question, or if any question is raised by a party interested in subsequent dealings with registered land, the question is referred to the court, which determines the matter after notice to all parties and a hearing.[3] Thus, as pointed out by Chief Justice Holmes,[4] even the ordinary business of the court is to be done only in accordance with its rules and under its supervision, and there is no possible ground for the objection that judicial powers are conferred upon the registrars as to matters subsequent to the original registration. Under this plan there is also secured *uniformity* in the practical administration of the system throughout the state.

And it is further reasonable to expect that such a separate court, properly constituted, would soon become recognized, as has been suggested by Judge Davis, associate judge of the land registration court in Massachusetts, "as a convenient tribunal for the determination of questions of real estate law."

Besides the constitutional obstacle, however, to the creation of a special court, which exists in some states, it has undoubtedly been thought impracticable, especially in the larger states, to require that all applications for registration shall be made to one central

[1] Mass., §§ 6, 7. [2] Ib. §§ 55, 56. [3] Ib. § 52.

[4] In Tyler *v.* Judges of Court of Registration, 175 Mass. at P. 81.

court, rather than to the local courts. To an inquiry recently made with this objection in view, of Judge Leonard A. Jones, of the Massachusetts court, he replies:—

"There is no difficulty whatever in administering our title registration law, as regards petitions from counties distant from Boston. The statute provides that the petition may be filed with the recorder (at the Boston office), or with the assistant recorder at the registry of deeds for the county in which the land lies. The papers filed with the assistant recorder are forwarded to the court at Boston. Upon the filing of a petition, whether with the assistant recorder, or in the office at Boston, the petitioner is required to file, in the registry of deeds for the county in which the land lies, a memorandum stating that the application has been filed, the date and place of filing, with a copy of the description of the land contained in the application. As a matter of practice, adopted by the court where the land is situated in a distant county, the notices published and served on all parties in interest, state that appearances and answers may be filed with the assistant recorder in the registry of deeds for that county, with whom a copy of the plan filed with the petition is deposited. If this abstract shows that the petitioner has a clear title, and no appearance is entered, the petitioner has no occasion to go to Boston. All the business is conducted by mail. If evidence is needed to perfect the title, or an appearance is entered and a hearing is necessary, especially if there are numerous witnesses to be heard, one of the judges goes to the county or city or town where the parties and witnesses are. This has been our practice in all cases heretofore."

He further says that hearings have been had in most of the cities and large towns within fifty miles of Boston, though it is found that if there are but two or three witnesses to be heard the lawyers and parties generally prefer to go to Boston for the hearing; and that when the court becomes so crowded with work that one of the judges cannot go often into other counties, the cause will be referred to one of the examiners of title as master, to hear the evidence and report to the court.

So manifest seemed the advantages of a separate court to the Virginia commissioner appointed to consider the Torrens system and to draft an act, that at his suggestion the recent constitutional convention of that state added the following clause to the article on the judiciary:—

"The legislature shall have power to establish such court or courts of land registration, as it may deem proper for the administration of any law it may adopt for the settlement, registration, transfer or assurance of titles to lands in the commonwealth, or any part thereof."

In the act prepared for that state, by the commissioner, Eugene C. Massie, Esq., of Richmond, though a separate court is established, careful provision has been made for conducting the cases in

the counties in which the lands are. Assistant recorders in each county are required to keep a docket of all matters so that any party there can see what has been done without going elsewhere; this is in addition to the docket kept by the recorder of the court at Richmond. As the act provides for but one judge, the evidence may be given before an examiner in the county where the land lies.

Should no separate court be established, but the law be administered by the county or district courts of general jurisdiction, it would seem advisable that provision should be made, as it is in the Minnesota law (§ 8), that all acts performed by registrars or recorders under the law, shall be performed under rules and instructions established by the court having jurisdiction in the county, and that, as in Massachusetts (§ 52), when any question occurs to a registrar or recorder, or is raised by a party, it should at once be referred to the court for determination.

II. THE EFFECT OF THE COURT'S DECREE—WHEN IT BECOMES CONCLUSIVE

The acts differ in regard to the time at which the decree directing the registration of title shall become conclusive. By the Massachusetts law the decree "shall bind the land and quiet the title thereto," and "shall be conclusive upon and against all persons, including the commonwealth, whether mentioned by name in the application, notice or citation, or included in the general description 'to all whom it may concern,'" if no appeal is taken within thirty days; except that one deprived of an interest in land by a decree of registration obtained by fraud may file a petition for review within a year, provided no innocent purchaser for value has acquired an interest. (§ 37). Thus residents of the state, as well as non-residents, and even those in adverse possession of the land, are conclusively bound, and whether named in the proceedings as parties or not. In Minnesota the decree is made conclusive in similar terms, except that one having an "interest or lien upon the land" who has not been actually served with process or notified of the filing of the application, may at any time within *sixty days* after the entry of the decree, appear and file his sworn answer, provided that no innocent purchaser for value has acquired an interest; and no proceeding for the recovery of the land shall be had after this period of sixty days, and within this period only on behalf of such persons as shall not, because of some irregularity, be bound by the decree.[1] It was con-

[1] Minn. § 27, 28, 29.

tended in *People* v. *Westfall*[1] that these provisions of the Minnesota act are unconstitutional, but the court holds that while it is true that the legislature "cannot require a person in the unchallenged possession of land to commence an action or institute any proceeding within a limited time to vindicate his claim, or be barred of all rights in the premises," it is equally true that when a party so in possession is served with process he must defend his rights in the land, and it is shown that if the act is complied with it is improbable that a claimant in possession would fail of receiving notice. Said the court:—

"However this may be, it is reasonably clear, and we so hold, that the particular provision of the act, which, in effect, forbids the commencement or the defense, in opposition to the decree, of any action or proceeding to recover the land brought more than sixty days after the entry of the decree, does not apply to an adverse claimant in the actual possession of the land, upon whom the summons is not served. . . . So construed, the provision of the act both as to the opening of the decree and as to the commencement of any action or proceeding to recover the land in opposition to the decree is valid as a statute of limitations. The time limit seems to us to be a short one, but, in view of the complete and far-reaching provisions of the act for notice to all parties, and the fact that the right of appeal as in civil actions is given, we cannot hold that the legislature arbitrarily exercised its discretion in fixing the limit."

Under the Illinois and Oregon acts[2] and the proposed Michigan act (§ 26, 27), the period which in Minnesota is fixed at sixty days is made *two years*. Hence the decree of registration and the certificate of title issued by virtue of it, are conclusive against parties to the decree, but any other persons having adverse rights who reside within the state, or who are in possession of the land, have two years from the decree in which to assert their rights. Moreover, a writ of error may in any case, under these latter acts, be sued out of the supreme court within two years after the entry of the decree.

In California "the decree of the court ordering registration shall be in the nature of a decree in rem and shall be final and conclusive against the rights of all persons" (§ 17), except that there is a limitation period of *five years*, during which time rights adverse to the title certified to in the original certificate may be asserted, though such action cannot affect the rights of a bona fide purchaser acquiring his interest since the first registration (§§ 45, 46).

Each act expressly provides that no exception to the conclusiveness of the decree of registration shall exist in favor of infants or

[1] 85 Minn., 437.

[2] Ill. § 26. 27; Ore. § 25, 26.

persons otherwise under disability. This is a matter within the discretion of the legislature of the state; the constitution of the United States gives to minors no special rights beyond others, and it is competent for a state to make or not to make exceptions in favor of infants or persons under disability.[1]

Most of those who have had an opportunity to observe the practical operation of the machinery of the new system regard it as essential to its efficiency that the decree of registration be conclusive practically at once, as in Massachusetts. If the decree may be made thus immediately conclusive one of the great objects of the system—the establishment of an indefeasible title in a certain person—is at once accomplished and the registered owner may make his title immediately available in the market, for purchasers and money lenders may deal with his certificate of title as conclusive. In Massachusetts, C. C. Smith, Esq., the recorder of the court of land registration, says that it is "not unusual for the negotiations and consummation of the transaction in registered land to be concluded the same day." Speaking of the two-year limitation period provided for in the Illinois law, Mr. Sheldon, the examiner of titles for Cook county, says that such provisions of the act "can have no effect upon the negotiability of a registered title during its first two years," because if the proceeding for initial registration "*has been properly conducted*, all necessary parties will be before the court and there will be no persons not bound by the first certificate of title."[2] Nevertheless, there must under the Illinois plan be some doubt as to the certainty of the title in the registered owner until the lapse of the limitation period, while under the Massachusetts plan there will be practically no doubt.[3]

But it was urged against the Massachusetts law that this feature, especially when considered with the alleged inadequate provisions of that law as to naming and notifying parties in interest, rendered the act unconstitutional. The approval of the act by the court in the *Tyler case*,[4] however, must necessarily set at rest many doubts, for no one can fail to be impressed by the opinion of Chief Justice Holmes in that case. It seems that there would have been no dissent from the judgment of the court in the *Tyler Case* had the act

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[1] Vance *v.* Vance, 108 U. S. 514, 521.

[2] Sheldon, Land Registration, p. 36.

[3] Fraud and forgery are perhaps *possible* under any system, but certainly the dangers to the title from them seem to be reduced to almost nothing under the Torrens System.

[4] 175 Mass. 71.

provided for a statute of limitations or for a right to a "writ of review." Loring, J., in his dissenting opinion, says:[1] "Whatever service other than personal service has been heretofore allowed, a judgment rendered in the absence of the defendant, so served, has never been held to be final, that is, not subject to be directly reviewed, or collaterally attacked; but it has always been held that a defendant is entitled to escape from such a judgment in some way, either by a proceeding instituted directly to vacate it, or by attacking it collaterally when it is sought to be enforced against him. In other words, it has always been held that he shall have an opportunity to be heard after the judgment on the merits of the original claim, if he did not in fact have an opportunity to be heard before the judgment was rendered." And (at p. 93); "It would be within the constitutional power of the legislature to enact, that the effect of some such decree as is provided for in this act, when properly proclaimed and served, should have the effect to put the claimant in possession of the title so set up, and that if that possession continued unbroken, and the decree setting up the applicant's title remained in force unmodified, for a specified time, all the world should be barred."

Any law following strictly the Massachusetts act will almost certainly be subjected to criticism and its critics will find in Justice Loring's dissenting opinion in the *Tyler Case* much to support them; on the other hand, the Illinois act is undoubtedly objectionable in providing for a limitation period of two years. The Minnesota law, therefore, with its sixty-day period may offer a fair solution of this difficulty, as it would avoid, on the one hand, the practical objections arising from the longer limitation period allowed by the Illinois act, and would, on the other, meet most of the objections urged against the Massachusetts law.[2]

III. THE PROVISIONS FOR NOTICE TO PARTIES ADVERSE TO THE APPLICANT

Such being the far-reaching effects of the decree of registration, the objection has been made to every "Torrens Act" which has yet been before the courts that no sufficient provision is made for notice to, or process against, those having claims adverse to the applicant for registration. It seems to be admitted by all that this

[1] 175 Mass. at p. 88.

[2] The proposed Virginia act provides for an appeal within ninety days and not afterwards, under the circumstances and in the manner as an appeal is taken from a circuit court.

is a matter of serious difficulty and those who are disposed to take a strict and narrow view of the requirement for "due process of law" appear to believe that no constitutional act can be framed. The extreme views on this point are represented by the Ohio court on the one hand and the Massachusetts court on the other. The former says:[1]—

"The general system in the contemplation of this act has been thought impracticable because questions of vested rights must remain open for want of due process. . . . . However the general system proposed by this act may have operated where no system of registration previously existed and the conserving influences of constitutions are not enjoyed, it seems, in its prominent features, to be inapplicable where constitutional provisions, paramount to legislative enactments, protect vested rights."

The Massachusetts court[2] speaking of the peculiar provision of the law of that state for substituted service on unknown defendants, whether residents or not, and using "a certain largeness in interpreting broad constitutional provisions," says:—

"If it does not satisfy the constitution, a judicial proceeding to clear titles against all the world hardly is possible, for the very meaning of such a proceeding is to get rid of unknown as well as known claims,—indeed, certainty against the unknown may be said to be its chief end; and unknown claims cannot be dealt with by personal service upon the claimant."

It is plain enough that constitutional requirements must be respected, but it seems also plain that if the adoption of a measure of reform demanded by changing conditions is to be prevented by a general and indefinable constitutional provision, the "*enjoyment*" of the "conserving influences of constitutions" is more imaginary than real. No one has yet appeared in any court to contest the validity of these registration laws, who has actually been deprived of his property without notice and an opportunity to be heard. And the supreme court of the United States has declined, though by a bare majority, to pass upon the question of the constitutionality of the Massachusetts law unless the person appealing to it shows either that he has been, or is likely to be, deprived of his property without due process of law; as no such showing was made in the case before the court, the majority held that they could not assume to decide "the general question whether the commonwealth has established a court whose jurisdiction may, as to some other person, amount to a deprivation of property."[3] A state of facts that will, under

[1] State *v.* Guilbert, 56 Oh. St. 575, 629.

[2] Tyler *v.* Judges, 175 Mass. 71.

[3] Tyler *v.* Judges of Court of Registration, 179 U. S., 405.

this decision, give the court jurisdiction seems most unlikely to arise if the laws are carefully executed. But it does not follow that the matter of giving notice can be slighted in the preparation of such an act; nor can it be regarded as a matter of theoretical interest merely, in spite of the decisions of three state supreme courts sustaining the validity of the acts before them.

Under the Ohio law the only notice which was required was to be given by the applicant himself, and in the application it was unnecessary to name any person claiming an adverse interest, as party defendant, although the names, places of residence and alleged interests of all such persons were known. The supreme court of Ohio says:[1]—

"One known to claim a title in fee simple adversely to the applicant need not be named in the application, nor receive a copy of the notice, though his place of residence may be within the county and known. As to him the only requirement is that he may have a chance to see a notice signed by the applicant, addressed 'to whom it may concern,' containing a brief description of the land to be registered, and published in any newspaper of general circulation within the county."

To the contention that this was sufficient notice to such persons, because the proceeding to register land under the act is *in rem*, the court replies:—

"Whether it is *in rem* or *in personam* is determined by its nature and purpose. To say that the legislature may prescribe such notice as is appropriate to proceedings *in rem*, and thus invest the proceeding with that character, is to affirm its power to annul the constitutional requirement. . . . It bears the least possible analogy to a proceeding *in rem*."

And the main ground of the decision in that case against the validity of the act was its failure to make provision for proper notice to adverse claimants residing within the jurisdiction.

The Illinois act of 1897 requires all persons having adverse claims who reside within the jurisdiction of the court to be made parties defendant and to be served with summons. Somewhat more in detail, the provisions of several sections[2] may be summarized as follows: The application is required to state the names and addresses of occupants (if the land is occupied by any other person than the applicant) and what interest they have or claim; the names and addresses of any persons holding incumbrances, with the nature, etc. of the incumbrances; whether any person has or claims any estate or interest in the land, in law or equity, in possession, remain-

[1] State *v.* Guilbert, 56 Oh. St. 575, 618.

[2] §§ 11, 13, 16, 19, 20, 21, 22.

der, reversion or expectancy, and if so, the name and address of such person and the nature of his estate or claim. If the place of residence of any person whose residence ought to be given is unknown, it may be so stated, if the applicant will also state that, upon diligent inquiry, he has been unable to ascertain the same. All persons named are defendants, and all others shall be considered as defendants by the term "all whom it may concern." The clerk is to issue summons against all defendants and the summons is to be served as in other cases in chancery. The clerk, immediately upon the filing of the application, is also to cause notice containing a description of the land and the names of all known defendants, to be published once a week for four successive weeks, and within ten days after the first publication is to send notices by mail to all defendants whose places of residence are stated, and whose appearance is not entered, and who are not served with process. Any person interested, whether named as defendant or not, may oppose the application for registration.

Everything possible seems to have been done to bring all parties having interests in the land before the court. But many objections were made to the Illinois act by its opponents, and among them that it authorized a judgment to be taken against a resident of the state upon mere constructive service. The supreme court of the state,[1] in considering this objection, makes no reference to the possible character of the proceeding as one *in rem*, but says:—

"It is certainly fundamental that no man shall be condemned unheard or without notice. While a substituted service is permitted in some instances, particularly in case of non-residents, this is because of the necessity of the case. The act does contemplate, in some contingencies at least, actual personal service, and the general law provides for publication as to unknown owners and persons in interest, and non-residents. An applicant may proceed in this way and in strict accordance with the act obtain a decree or finding as to his title which will be binding beyond all question, so that even if the proper construction of the act were that it attempted to authorize judgment against a resident notified only by publication, yet the law can be given practical effect, in which event only the particular provision would fail, and not the whole law."

But of that part of the act (§ 26) which provides that any person having an interest in the land, whether served personally, notified by publication or not served at all, must appear and answer within two years or be conclusively bound, the court said that it—

"Seems to attempt to make a decree binding upon persons not parties to

[1] People *v.* Simon, 176 Ill., 165, 177.

the suit, and if given effect literally, would deprive persons of vested rights without due process of law."

And in so far as it does this it cannot be upheld, though it is valid as a limitation law; and further that:—

"Even though the language of this section may be broad enough to amount to an attempt to transfer an estate by the law or by decree, yet it is possible to carry out the purposes of the act without violating the constitution in the respect complained of."

The Minnesota act is substantially the same as the Illinois act in regard to the matters of naming and notifying parties defendant; except that by this act process is not issued by the clerk until a preliminary examination by an examiner of titles as to the truth of the allegations of the application and a report by him. Regarding the objection raised to this law that under it a person in the actual possession of land, the title to which is to be registered, may be served only by publication and thus deprived of his title without having any actual knowledge of the proceedings for establishing the applicant's title, the supreme court of Minnesota says [1]:—

"If this be the correct construction of the provisions of the act relating to the service of the summons, they do not constitute due process of law.[2] But the act is not reasonably susceptible of such a construction. The application for registration must be presented to the district court of the county in which the land is situate; hence such occupant is not a non-resident party, nor an unknown one. Having possession of the land he has an apparent interest therein, and, if he is not the applicant must be made a party defendant, and the summons served upon him as in civil actions. It is only on non-residents and unknown persons or parties that service by publication may be made. . . . . The proceeding is substantially one *in rem*, the subject matter of which is the state of the title of land within the jurisdiction of the court, and the provisions of the act for serving the summons and giving notice of the pendency of the proceedings are full and complete and satisfy both the state and federal constitutions."

In Massachusetts the provisions as to notice in the original act (1898) were by no means so full and complete as are those in the Illinois and Minnesota laws. Though the supreme court of that state sustained the law, the court was not unanimous in its judgment, and Chief Justice Holmes said, in expressing the opinion of the majority [3]:—

"I am free to confess, however, that with the rest of my brethren, I think the act ought to be amended in the direction of still further precautions to secure actual notice before a decree is entered, and, that if it is not amended,

[1] State *v.* Westfall, 85 Minn., 437, 443.

[2] Baker *v.* Kelley, 11 Minn. 358.

[3] Tyler *v.* Judges, 175 Mass. 71.

the judges of the court ought to do all that is in their power to satisfy themselves that there has been no failure in this regard before they admit a title to registration."

Since this decision the act has been amended so that the land registration court is expressly required to, "so far as it considers it possible, require proof of actual notice to all adjoining owners and to all persons who appear to have any interest in or claim to the land included in the application. Notice to such person by mail shall be by *registered* letter."[1] The certificate of the recorder that he has served the notice as directed by the court, by publishing or mailing, is made conclusive proof of such service. The act, therefore, simply requires notice to be given by mailing registered letters, by publication and by posting upon the property; this notice is to be addressed by name to all persons known to have an interest adverse to the applicant's, and to adjoining owners and occupants so far as known, and "to all whom it may concern."

About one-third of the opinion of the court in the *Tyler Case*, as rendered by Chief Justice Holmes, is given up to a most interesting and forcible discussion of the distinction between actions *in rem* and *in personam*, in which he says:—

"Speaking for myself, I see no reason why what we have said as to proceedings *in rem* in general should not apply to such proceedings concerning land. . . . . But it is said that this is not a proceeding *in rem*. It is certain that no phrase has been more misused. . . . . If the technical object of the suit is to establish a claim against some particular person, with a judgment which generally, in theory at least, binds his body, or to bar some individual claim or objection, so that only certain persons are entitled to be heard in defense, the action is *in personam*, although it may concern the right to or possession of a tangible thing.[2] If, on the other hand, the object is to bar indifferently all who might be minded to make an objection of any sort against the right sought to be established, and if any one in the world has a right to be heard on the strength of alleging facts which, if true, show an inconsistent interest, the proceeding is *in rem*.[3] All proceedings, like all rights, are really against persons. Whether they are proceedings or rights *in rem* depends on the number of persons affected."

The discussion, however, while pursued as satisfactory to the chief justice, is not necessary to a decision of the case, as the notice provided for in the act is held by the court to meet all constitutional requirements, even though the proceeding be not one *in rem*. In regard to constitutional prohibitions against depriving any person of his property without due process of law, the court says:—

[1] R. L. 1902 Ch. 128 § 31.

[2] Mankin *v.* Chandler, 2 Brock. 125, 127.

[3] Freem. Judgments 4th Ed. § 606 *ad fin.*

"The prohibitions must be taken largely, with a regard to substance rather than to form, or they are likely to do more harm than good. It is not enough to show a procedure to be unconstitutional to say that we never have heard of it before."[1]

There appear, however, to have been but five of the seven judges of the Massachusetts court sitting in this case, and the dissent of two as expressed by Justice Loring will not be ignored in future discussions. He agrees with the chief justice neither in his discussion as to whether the proceeding is or is not one *in rem*, nor in the conclusion of the majority irrespective of this point.

We have, therefore, the Ohio court's judgment that such proceedings are in no sense proceedings *in rem;* that of the Minnesota court and Chief Justice Holmes that they are substantially such, and that of two justices of the Massachusetts court that they are not, with no expression of opinion on this point from two other justices of that court; and no reference to it by the Illinois court.

The practical lesson to be learned from these decisions is, it seems, that in acts of this nature there should be the amplest provision made for giving notice to all adverse parties by personal service wherever this is possible, and by substituted service only when no other is reasonably possible.

In certain kinds of proceedings, somewhat analogous to judicial proceedings, and which may result in depriving one of his property, notice need not be, in express terms, provided for in the statute authorizing the proceedings, for they may be held valid if notice is actually given.[2] But in judicial proceedings "due process" not only requires notice, but that the statute authorizing the particular judicial proceedings should make provision for notice for the guidance of the court, so that it may not be called upon to legislate to supply defects in the statute to suit each case as it arises.[3] The kind of notice, however, which is required in judicial proceedings, must vary with the nature of the proceedings, and their proper classification as *in rem* or *in personam* seems not unimportant.[4]

IV. THE INVESTIGATION OF THE TITLE—EXAMINERS OF TITLE, THEIR QUALIFICATIONS AND THE MANNER OF APPOINTING THEM

It is obvious that there should be such an examination of the title before its registration as to guard against error. Under the

[1] Hurtado *v.* People, 110 U. S. 516, 537.

[2] See, for example, Gilson *v.* Munson, 114 Mich. 671; People *v.* Gilon, 121 N. Y. 551; Paulsen *v.* Portland, 149 U. S. 30.

[3] Risser *v.* Hoyt, 53 Mich. 185. 199, 206, 209.

[4] Garrison *v.* Hecker, (Mich. 1901) 87 N. W. 642; Bardwell *v.* Collins, 44 Minn. 97.

original system as adopted in the Australian colonies the application to have land placed on the register of titles was submitted, together with deeds, abstracts of title and plans of the land, to a barrister and a conveyancer, styled "examiners of titles," for their examination. These "examiners" then reported to the "recorder" or "registrar" their conclusions upon the applicant's title. They made such recommendations regarding the serving of notices as the nature of the case and the domicile of parties likely to be interested in the land seemed to require. It was not essential, however, that there should be in all cases, as a basis for the registration of the applicant's title, any other proceeding than this.

The adoption in the Illinois law of 1895 of this scheme of giving the registrar authority to determine the applicant's title on the advice of two competent attorneys acting as examiners, rendered that law unconstitutional, as conferring judicial power on the registrar in violation of the constitutional restriction against the legislative grant of such powers to non-judicial officers.[1]

Under the later statutes in the several states which provide for constitutional judicial proceedings, it would be possible for the court, which must ultimately determine whether or not the applicant's title is good, to undertake the investigation of the title, upon evidence submitted by the parties interested and without independent investigation. Each American act, however, provides for the appointment of an examiner of titles to aid the court in this investigation. The application is referred to him immediately after its filing and his duty is to investigate the facts stated therein and to see that all persons having claims to the land are before the court.

Under the Massachusetts law (§§ 29, 30, 31) and that of Minnesota (§§ 17, 18) such notice to adverse parties as the acts respectively provide for is given only after a preliminary investigation by the examiner and upon his report favorable to the applicant's title, or upon the election of the applicant to proceed further, in spite of the examiner's adverse opinion. Under these laws the examiner may make a further report upon reference to him by the court after appearance and answer of defendants, or after default entered against persons not appearing and answering.[2] Substantially the same procedure is provided for by the California law (§§ 12, 13, 18, 19). Under the Illinois and Oregon acts, though the matter "may be" referred to the examiner of titles immediately upon the filing of the application, the issuance of process and publication of

[1] People v. Chase, 165 Ill. 527.

[2] Mass. § 35; Minn §§ 24, 25.

notice do not depend upon his preliminary investigation and report.[1] Nor may a report be made by him until after the time specified in the published notice for the appearance of defendants, nor until persons appearing are given opportunity to introduce their proofs.[2]

Under either method of procedure the examiner has extensive powers and responsibilities. Though he may hear the parties and their evidence, he also investigates the title independently of proofs offered By some of the acts it is his especial duty to ascertain, if the land is occupied, and if so, the nature of the occupation,[3] and even where there is no such express requirement this would be a part of his duty, as the application must state the facts in regard to occupation and the examiner must report on all matters stated in the application. He looks into all matters affecting the title, whether they are of record or in pais. His report is similar to that of a master in chancery where that officer is recognized,[4] or to that of a referee.[5]

As the effect of the registration of title, if the applicant is successful, is to establish his title against all claims, and as the laws (except that of California) provide for an assurance fund to indemnify those who may be deprived of their rights in the land, it is evident that the examination of title should be thoroughly and intelligently conducted, and that much must depend, practically, upon the qualifications of the examiner for this employment. This will be especially true where there is no separate land registration court established and where, therefore, the court to be aided by the examiner is one of general jurisdiction. In statutes strictly following the Illinois act additional importance attaches to the office of examiner of titles because of the power given him in regard to dealing with registered land when an equitable interest has been created in it by a declaration of trust. Most of the acts provide that no instrument dealing with land so held shall be registered without an order of court approving it as being in accordance with the trust. But under the Illinois act this may be done either "pursuant to the order of some court, *or upon the written opinion of* two examiners" that such instrument is in accordance with the true intent of the

[1] Ill. §§ 18, 19, 20; Ore. §§ 17, 18, 19.

[2] Ill. § 18; Ore. § 17.

[3] Ill. § 18; Minn. § 17; Ore. § 17.

[4] Gage *v.* Consumers' El. Lt. Co., 194 Ill., 30.

[5] Minn. § 24.

trust, and when the registrar is satisfied with this opinion the validity of this later transfer is conclusively established.[1]

The matter of the appointment of the examiner of titles is therefore of importance.

In California, Massachusetts, Minnesota, and Oregon, he is appointed by the court. In Massachusetts there may be one or more examiners appointed in each county who shall be attorneys at law, and shall be subject to removal by the supreme court;[2] in Minnesota one or more competent attorneys shall be appointed in each county;[3] in California and Oregon the court may, it seems, appoint a different examiner for each case as it arises,[4] and while he must, in California, be "an attorney in good standing, skilled in the examination of titles," no such requirement is made in Oregon. In Illinois the registrar in each county where the law is in force may appoint two or more competent attorneys as examiners.[5]

The desirability of having only skilled and competent conveyancers as examiners of title seems manifest. It seems equally plain that they should be appointed by the court, rather than by the registrar of each county, and, further, that they should be appointed as officials directly connected with the system, rather than for each case as it may come before the court.

The proposed Michigan law provides that the several circuit court commissioners in and for the several counties of the state shall be examiners of titles and shall give bonds in such amount and with such security as shall be approved by the judge of the circuit court (§ 5); and each register of deeds—who is, under the proposed law, made the registrar of titles in his county—is liable for any neglect or omission of the "examiner of titles" in the same manner as for his own personal neglect or omission (§ 6). The wisdom of such provisions as are contained in this proposed law is at least questionable. The circuit court commissioner, admitting that he is well qualified for the special work demanded, cannot, consistently with his other duties, give the prompt and uninterrupted attention to the examination of title that is required; and

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[1] Ill. §§ 68, 69; the proposed Michigan act gives the same effect to the opinion of *one* examiner—§§ 68 69—while the Oregon act—§§ 67, 68—makes the later dealing dependent upon the order of some court "or the filing of an *affidavit of the person applying* for registration" of the instrument that it is in accordance with the meaning of the trust. In People *v.* Simon, 176 Ill. 165, Boggs, J., dissented without writing an opinion; would not this provision conferring powers so nearly judicial on the registrar justify his dissent?

[2] Mass. § 11.

[3] Minn. § 13.

[4] Cal. § 18; Ore. § 17.

[5] Ill. § 5.

certainly a register of deeds should not be liable for the negligence of an official elected by the people and over whom he has no control. The Illinois act makes the registrar liable for the neglect of the duties of his office by an examiner of titles, and there is some propriety in this provision there, as under that act the registrar appoints the examiner. The inadvisability of literally copying portions of a long statute of another state, without regard to changes made by the adopting state in other parts of its own statute, is illustrated by the Oregon law in which is incorporated the Illinois provision making the registrar liable for the neglect of the examiner though the examiner is there appointed by the court (§§ 4, 17) instead of by the registrar as in Illinois.[1] No attempt should be made to render the registrar liable for an examiner's neglect, unless the former controls the appointment of the latter; and where an assurance fund is provided for such liability seems unnecessary in any case, as this fund is intended to compensate one injured by a clear neglect of duty on the part of the examiner.[2]

To peculiar provisions in the California law regarding the investigation of the applicant's title is undoubtedly largely due the fact that the act is practically inoperative. The examiner's compensation is, by that law, made a part of the costs of the proceeding, to be paid by the applicant (§ 18), and an abstract of title is required to be filed by him, but the abstract can be furnished by those only who have given bonds in the sum of not less than ten thousand dollars which sum "may be increased from time to time by order of the court." (§ 6) In Massachusetts the compensation of examiners and other officials (the judges excepted, whose salaries are fixed by the act) is determined by the governor and council and paid from the state treasury; in the other states the salaries of the examiners of titles are generally determined as are those of other county employees and are paid by the county.

An abstract of title is a proper aid to the examiner in his investigation, and the Minnesota act provides (§ 15) that the applicant shall file one with his application. Even where it is not provided for by the terms of the law, as is the case in Massachusetts, it is

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The Oregon act appears to be substantially a somewhat carelessly made copy of the Illinois act; parts of the Illinois act are copied without regard to a change made in numbering the sections of the Oregon act. So, for example, § 82 in the Oregon act refers to § 86 when the reference should be to § 87; § 98 refers to § 83, intending § 82; § 101 speaks of "the registrar *his* examiners of titles"—perhaps a proper designation in Illinois, but not in Oregon where the registrar does not appoint the examiners; § 46 of the Oregon law refers to "the transferee (er)," copying the misprint in the corresponding Illinois section 47.

[2] Mass. § 96; Minn. § 85; Ill. § 101; Ore. § 100.

the usual practice to require it. It seems that the Minnesota provision might well be adopted in any law. Unless, however, it has been the policy of the state to require makers of abstracts to give bonds, a special provision to this effect seems unnecessary: nothing more is needed than that the abstract shall be satisfactory to the examiner, who, under other *proper* provisions of the land registration law, will be qualified to determine what a suitable abstract is.

V. THE ASSURANCE OR INDEMNITY FUND

The acts generally provide for the accumulation of a fund for making good any loss one may suffer through mistake, negligence or wrong in the practical operation of the law. This provision is made in recognition of the fact that no system of transferring title has yet been devised in which there is not *liability* to loss. But the provision is not an essential feature of this system of land title registration and transfer. There is no "assurance fund" provided for by the California act, and the Illinois supreme court gives this part of the Illinois law no consideration, saying: "The law can, as we think, stand and accomplish its purpose without it."[1] Each of the acts, however, except that of California, makes provision for such a fund by requiring the payment, when lands are brought under the act, of a small sum—one-tenth of one per cent of the value of the land, the value being, generally, ascertained by reference to its appraisement for taxation. The payment is to be made to the public treasurer. The methods by which recovery may be had from it by those entitled to compensation are prescribed in detail. Wherever the system has been in operation, however, the demands upon the fund have been extremely rare.

VI. VOLUNTARY OR COMPULSORY REGISTRATION?

Under each of the American acts registration of title is voluntary; no landowner is obliged to bring his land within the provisions of the act.

The later English act[2] provides that by Order in Council registration of title to land may be made compulsory on sale of the land in any county named in the order, and orders have been made by which registration is compulsory in certain parts of the county of London: a purchaser does not, therefore, where the order applies, acquire the legal estate until he is registered as proprietor of the land.

[1] People *v.* Simon, 176 Ill., 165, 177.

[2] Land Transfer Act, 1897; 60 and 61 Vict. c. 65, s. 20.

Mr. Sheldon, in his work on the Illinois law, says: [1] "Upon investigation of the subject it will be found impossible to resist the conviction that the public good requires compulsory registration of title."

It was the intention of the Ohio commission that the law of that state should provide that title to land should be registered in all cases on the death of its owner.

By this means it was expected that the law would gradually become general in its operation, without inconvenience to any owner of land, and without crowding the registry and courts. The legislature, however, by changing "shall" to "may" (§ 92) changed the meaning of the act in this particular, and no provision similar to that suggested by the Ohio commission has become a part of any American statute.

One who believes in the general principles of the Torrens system, must agree with Mr. Sheldon as to the desirability of compulsory registration, and the method suggested by the Ohio commission for bringing this about seems worthy of imitation.

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[1] Land Registration in Illinois, preface.